For the reasons I have stated, I would hold that the learned arbitrator rightly decided that the deceased died of an accident arising out of and in the course of his employment. The amount of compensation which was awarded has not been challenged. I would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Allen, Gledhill & Ball; Tan Tian Tiok & Co.*

SIM TIEW BEE v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P, Ismail Khan C.J. (Borneo) and Raja Azlan Shah J.) October 22, 1973]

[Kuching — Federal Court Criminal Reference No. 7 of 1972]

Evidence Act, 1950, s. 32 — Hearsay — Statement made by person in course of business — Admissible in evidence if it is proved that the maker is dead or cannot be found or has became incapable of giving evidence or whose attendance cannot be procured without reasonable delay or expense — Circumstances must be proved — Statement on labels or markings — Burden of proof — Unsworn statement — Criminal Procedure Code, 1960, s. 202(5).

In this case the applicant had been charged and convicted of the offence of being concerned in the importation of uncustomed goods. At the trial evidence of the following documents were admitted —

(1) the ship's manifest, without the master or officer responsible for the document being called to prove the contents;
(2) the tally sheet prepared by a tally-clerk, who was called to give evidence but stating measurements which were taken by a coolie in the presence of the tally-clerk;
(3) the words "Sim Tiew Bee, Sibu" on the gunny sacks as indicative of the name of the consignee.

An appeal to the High Court was dismissed and a reference to the Federal Court was made by the applicant.

Held: (1) the ship's manifest was inadmissible in evidence without the master or officer responsible for it being called to prove its contents but as it was a statement made by a person in the course of the business of the shipping company it would have been admissible if it was proved that the maker was dead, could not be found or had became incapable of giving evidence or whose attendance could not be procured without unreasonable delay or expense. As the condition precedent to the reception of the document had not been proved, the document was inadmissible;

(2) as the measurements noted in the tally sheet were taken by the coolie, only the coolie could give evidence of those measurements. The entry in the tally sheet was made in the course of the business of the shipping company and would have been admissible if the condition for its admission under section 32(b) of the Evidence Act had been satisfied. As there was no evidence of this, the document was inadmissible;

(3) the words "To Sim Tiew Bee" on the gunny sacks were labels or markings and therefore being hearsay, are not by themselves evidence that the applicant was the consignee of the goods;

(4) despite the wrongful admission of the documents, there was on the facts evidence to sustain the conviction. The applicant had failed to show on a balance of probabilities that his labourers had removed the wrong goods.

Cases referred to:-

(1) *Chainchal Singh* v. *Emperor* A.I.R. 1946 P.C. 1 at p. 2.
(2) *Bal Gangadhar Tilak & Ors.* v. *Shrinivas Pandit & Ors.* A.I.R. 1915 P.C. 7 at p. 11.
(3) *Scott* v. *Baker* [1969] 1 Q.B. 659 at p. 672.
(4) *Patel* v. *Controller of Customs* [1965] 3 All E.R. 593 at p. 597; (1966) A.C. 356.
(5) *Myers* v. *Director of Public Prosecutions* [1964] 2 All E.R. 881.

FEDERAL COURT.

C. T. Wong for the applicant.

Denis Ong Jiew Fook (Deputy Public Prosecutor) for the respondent.

Ismail Khan C.J. (Borneo): This is a reference to this court under section 66 of the Courts of Judicature Act, 1964 by the applicant (hereinafter called the appellant), the questions being:

(1) Whether or not the court can admit and take into consideration as true the contents of the following documents: —
   (a) Exhibits P14, P14A, P14B, P14C — the Ship's Manifest.
   (b) Page 26 of Exhibit P22 — Tally Sheet.
   (c) Exhibits 6-1, 6-2, and 6-3 with the words "SIM TIEW BEE, SIBU" on certain gunny sacks as indicative of the name of the consignee without calling the makers thereof.
(2) Whether an appellate court can invoke the provisions of section 32(b) of the Evidence Ordinance in admitting Exhibits P14, P14A, P14B, P14C — the Ship's Manifest and page 26 of Exhibit P22 — Tally Sheet when the basis of such admission was not being laid in the court of first instance.

The questions arose out of the following circumstances. The appellant was tried on an amended charge which reads:

"That you between 27th January and 2nd February of 1970 at Sibu were concerned in importing into Sarawak certain uncustomed goods to wit 23 various textile items as listed in the schedule attached and valued at $10,784.49 of which gross duty was assessed at $2,958.24, which arrived at Sibu Port on the m.v. 'Giang Ann' on the 2nd February 1970, and that you thereby committed an offence under s. 135(1)(a) punishable under s. 135(1)(i) of the Customs Act 1967."

The case for the prosecution is this.

On the 29th January, 1970, the ship m.v. "Giang Ann", left Singapore for Sarawak laden with cargo. Of this cargo, 37 packages described as foodstuffs were for Sim Tiew Bee Trading Company, Sibu, of which the appellant is the proprietor.

On the 2nd February, 1970, the ship arrived at Sibu. These 37 packages (hereinafter referred to as Group A) were offloaded to Godown "A". The appellant arrived at the customs for their release. He had two invoices, the first P3 relating to a consignment of 30 packages of peanut oil (hereinafter called the first consignment); the second P4 in respect of (a) 3 cases of dried olives; and (b) 4 cases of sweets, comprised in another consignment (hereinafter called the second consignment). These documents were accompanied by two mate receipts P9 and P10 relating to the first and second consignments respectively.

Along with these invoices and mate receipts (P3, P4 and P9 and P10) the appellant handed to the Customs Officers two declarations, P1 in respect of the first consignment and P2 in respect of the second consignment. After the usual check of these documents these two declarations P1 and P2 were passed as correct. P1, P3 and P10 were each given the number 3359 and P2, P4 and P9 the number 3500. The 37 packages were given a clearance by the Customs as being the goods set out in the documents, but without any phy-

sical examination of their contents. The appellant was then given two godown warrants P7(1) and P7(2) for the release of his 37 packages. P7(1) bears the number 3359 and P7(2) the number 3500. These warrants he gave to the Customs Officer at the Godown gate. He also gave instructions to his labourers to remove the packages to his store at Lanang Road, Sibu. Ten packages were released under the warrants as being 10 of the packages in the declarations (P1 and P2) described as containing foodstuffs. These were removed by the labourers to a lorry outside the godown engaged by the appellant, which then drove off. A short distance from the godown, somewhere near the junction of Lanang Road and Mission Road, Sibu, the lorry was stopped by a party of police. The only cargo was the 10 large packages, 6 in gunny sacks and the remaining 4 in uncovered wooden cases. The sacks P6(1-3) covering three of the crates had each certain Chinese characters written thereon translated to mean "To Sim Tiew Bee, Sibu." Two of the cases with the marks S.T.B. on them contained toffee. In the other 8 cases were found the textiles set out in the schedule to the charge. These textiles were dutiable and no duty had been paid thereon.

On the 21st February, 1970, 37 packages of foodstuffs (hereinafter referred to as Group B) were found scattered all over godown "A". There were:

1. 30 cartons of peanut oil; on many appeared the name of Sim Tiew Bee (appellant's name) and number 3359 in chalk;

2(i) 3 wooden cases of dried olives on which appeared the marking S.T.B. and the number 3500 in chalk; and

(ii) 4 cartons of sugar confectionery on two of which appeared the markings S.T.B. and the number 3500.

These appear to be identical with those set out in the declarations (P1 and P2). Their total volume was only a fraction of the 37 packages (Group A) offloaded for the appellant on the 3rd February, 1970. According to the ship's manifest, P14(A-C) these 37 packages (Group A) measured 365 cubic feet and, according to P22 (Sheets 26 and 41) 317 cubic feet. The 37 packages (Group B) found in the Godown were only 26.67 cubic feet in volume, *i.e.* about one-twelfth of the volume of the 37 packages (Group A) as shown in P22.

The tally sheets P22 (pages 41 and 26) show that 7 cases were shipped on board the m.v. "Giang Ann" in Hatch II and 8 cartons, 8 bales and 14 cartons in Hatch I, and according to tally sheets P23 all these packages were offloaded at Sibu. The mate receipts P9 and P10 show the receipt of the packages (Group A) by the vessel.

The appellant made a cautioned statement, the material portion whereof is as follows:

"So on 3.2.70 at about 2.00 p.m. I went to the customs godown 'A' and I noted that my goods had arrived, and I went to secure two warrants for the release of these goods. So together with a fat, stout Chinese customs officer, we looked through the exterior of these thiry-seven cartons of goods and did not need to open any as the contents were already written on the cartons.

After that, I told an in-charge of labourers' team to have these things moved to my warehouse at Lanang Road. I told the labourers to carry all the boxes bearing my name. So the labourers began to work while I engage myself talking to the in-charge labourer, Chu Tian Mok, nearby.

After that I went out but I did not pay attention to my goods being loaded into the lorry.

About the ten crates of goods you have taken possession, though they were all addressed to my name I know nothing about them as I have not received anything in connection with the ten boxes. I went to Sarikei that day as I had business there."

No complaint was received by the shipping company that whoever imported the ten cases had not received his goods.

His defence was that he had no knowledge of the ten crates removed from the godown by the labourers. What he imported were the 37 packages (Group B) and according to him the labourers must have removed the wrong packages.

The learned magistrate convicted him.

From this decision there was an appeal to the High Court; the main ground being that the magistrate misdirected himself in admitting the evidence of the documents, *viz*:

(1) Exhibits P14(A-C) — the ship's manifest;

(2) Page 26, Exhibit P22 — the tally sheet; and

(3) Exhibits 6(1) to 6(3) with the words "Sim Tiew Bee, Sibu" on the gunny sacks as indicative of the name of the consignee.

This appeal was dismissed.

At the hearing of this reference, counsel for appellant's arguments were mainly directed to the question of the admissibility of these documents. He contended that the ship's manifest was a private document, and the master or the officer responsible for such a document should have been called to prove the contents. The learned judge held that it was not necessary to call the maker of the document as it was made pursuant to section 52 of the Customs Act. With due respect, we do not agree. It was not made by the master of the vessel as a public officer in the discharge of a public duty. The master in delivering the manifest did not act for the public, but did so for the purpose of getting his cargo landed. The fact that it was done in compliance with section 52 of the Customs Act does not necessarily invest it with a character that would attract section 35 or section 74 of the Evidence Act.

Under section 256 of the English Merchant Shipping Act, 1894, all documents delivered or transmitted to port superintendent and officers of customs must be in turn transmitted by them to the Registrar of Shipping and Seamen. The Registrar-General then records and preserves them and they are admissible in evidence in the manner provided by statute and are open to public inspection. This provision has no counterpart in our Merchant Shipping Ordinance. Section 260 of the Ordinance says: —

"260.—(1) Where a document is, by this Ordinance, declared to be admissible in evidence, such document shall on its production from the proper custody, be admissible in evidence in any court ... and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Ordinance...."

The only document which appears to be so admissible in evidence is the official logbook. Section 118 says: —

"118.—(1) An official log book shall be kept in every Sarawak ship, in the appropriate form for that ship approved by the Director.

....

(6) Every entry made in an official log book in the manner provided by this Ordinance shall be admissible in evidence."

But the manifest is a statement made by a person in the course of the business of the shipping company. It is therefore admissible in evidence provided it is proved that the maker is dead, cannot be found, or has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable. (Section 32(b) of the Evidence Act.)

The learned judge, however, held that it was admissible. He said:

"For myself I think it is unreasonable to ask either the master or the agent of the vessel to testify to Exhibit P14 when undue delay or expense would be incurred."

This finding is not supported by evidence. The condition precedent to the reception of the document should be independent evidence that it would involve such delay and expense as would seem unreasonable.

In the case of *Chainchal Singh* v. *Emperor*[1] evidence given by a witness in a judicial proceeding was to be used under section 33 of the Indian Evidence Act in a subsequent judicial proceeding on the ground that the witness was incapable of giving evidence. It was held by Lord Goddard that:

"Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the court, and it is only by a statutory provision that this can be achieved. But the court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case a party can if he chooses waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence."

In the case of *Bal Gangadhar Tilak and others* v. *Shrinivas Pandit and others*,[2] Lord Shaw said:

"Under section 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding in a criminal trial is relevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, but it is only, as the section proceeds:—

'when the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way etc.'

Not one of these circumstances was proved in the present case, and the depositions could not have been used with propriety even to support the evidence of the plaintiffs. . . ."

These cases dealt with section 33 of the Indian Evidence Act, but they are applicable to section 32(2) which section is similar to section32(b) of our Evidence Act.

In the instant case no such proof having been led, the document is therefore not receiveable in evidence. This answers question (1)(a) and the first limb of question (2).

With regard to the tally sheet, page 26 (Exhibit P22), we do not think that the question in respect of this item has been correctly framed. The maker of Exhibit P22, page 26 was called. He said in evidence: —

"Exhibit P22, Sheet 26 is a tally sheet in my handwriting and signed by me. . . It shows the measurements of each unit which were taken in my presence by a coolie. I did not check if they were correct."

He proved that he tallied 30 units, 14 cartons, 8 bundles and 8 cartons at Singapore. The dispute is about the measurements of the packages. It was his duty apart from recording the number of units tallied, to take and check the measurements of the cargo. His failure to check the measurements is a serious dereliction of duty. The learned magistrate did not say if he thought him worthy of credit or otherwise. In the circumstances, only the coolie could give evidence of these measurements. The question, therefore, should be whether or not the court can admit and take into consideration the contents of Exhibit P22, sheet 26, in so far as it relates to the measurements of the packages set out therein.

Regarding the measurements, the learned judge said:

"In the absence of any evidence to the contrary the trial court is entitled to invoke the provision of section 116 of the Evidence Ordinance and the Latin maxim which says *'omnia praesumuntur rite et solemniter esse acta'*, i.e. all things are presumed to be done correctly until the contrary is proved."

We have very grave doubts as to whether this maxim is applicable. In the case of *Scot* v. *Baker*,[3] Lord Parker said of this maxim:

"I think for myself that one ought to take very great care in a criminal case as to the length one goes in applying that presumption."

The maxim would apply to judicial and official acts, but it would be pressing it too far to apply it to the act of a coolie. Nevertheless, the entry in the tally sheets P22 of the measurements was made in the course of the business of the shipping company and in our view is admissible provided that the condition for its admission under section 32(b) of the Act was satisfied. Of this, there is no evidence. The document is, therefore, inadmissible. This answers question (1)(b) and the second limb of question (2).

The last question is whether the words "Sim Tiew Bee, Sibu" on the gunny sacks (Exhibit P6(1-3) are admissible as evidence of the name of the consignee of the 10 cases without calling the makers thereof. In the case of *Patel* v. *Controller of Customs*,[4] the appellant was convicted of making a false declaration on a customs import entry in respect of five imported bags of corriander seed. Instead of declaring the origin of the seed to be Morocco, he declared the origin of the seed to be India, contrary to section 116 of the Fiji Customs Ordinance. He was convicted. On appeal to the Privy Council, Lord Hodson said: —

". . . The only evidence purporting to show that this entry was false is the legend 'produce of Morocco' written on the bags. Their Lordships are asked by the respondent to say that the inference can be drawn that the goods contained in the bags were produced in Morocco. This they are unable to do. From an evidentiary point of view the words are hearsay and cannot assist the prosecution. This matter need not be elaborated in view of the decision of the House of Lords in *Myers* v. *Director of Public Prosecutions*,[5] given after the Fiji Courts had considered the case. The decision of the House however makes clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially to include such things as labels or markings. . . . Nothing here is know of when and by whom the markings on the bags were affixed and no evidence was called to

prove any fact which tended to show that the goods in question in fact came from Morocco..."

These words "To Sim Tiew Bee" are labels or markings on the exhibit P6(1-3) and by themselves are not evidence that the appellant was the consignee of the goods.

Despite the answers to the questions posed, we find that there is evidence to sustain the conviction. Exhibit P22 (Tally sheets 26 and 41) show that 30 packages made up of 8 crates, 8 bales and 14 cartons were loaded on to Hatch II of the ship on the 27th January 1970 against marks S.T.B. and 7 packages made up of 5 cases and 2 bundles into Hatch I on 28th January, 1970.

Thirty packages described as peanut butter were, according to the mate receipt P10, received for the accused on board 27th January 1970 and 3 packages described as dried olives and 4 packages described as sugar confectionery were, according to the mate receipt P9, received on board for the accused on 28th January 1970. Although these 37 packages were cleared by customs as being the foodstuffs set out in the declarations, there was no physical examination of their contents. The two godown warrants P7(1) and P7(2) entitled him to remove them on or after the 3rd February, 1970. He personally presented these godown warrants at godown "A" for release to his coolies whom he instructed to remove them to his store at Lanang Road. That there was no physical examination of their contents is borne out by appellant's cautioned statement wherein he said:

"...I went to secure two warrants for the release of these goods. So together with a fat, stout Chinese customs officer, we looked through the exterior of these thirty-seven cartons of goods and did not need to open any as the contents were already written on the cartons."

The 10 packages found in the lorry and removed from the godown by the labourers were released on the strength of the two godown warrants. They were released as being 10 of the 37 packages which the appellant had declared to contain foodstuffs. And as the learned magistrate pointed out:

"Customs procedures require the examining officer to put his initials and the number of the relevant import declaration on each package of imported goods (unless they were in standard packages in which case he puts these marks only on some) when he examine them in the godown for the necessary customs clearance. The purpose of this is so that the customs officer at the godown exit gate will allow out only the packages that are so marked and which appear to be consistent with the godown release warrants which he holds for tallying purposes. The number '3500' which was the number of one of the accused's import declarations, appeared on one of the ten cases in question, but it seems no initials of the examining officer appear on it. It seems too that there was no import declaration number and no examining officer's initials on any of the other nine packages when the customs gate officer permitted the coolies to take them out from the godown. None of these ten packages should therefore have been allowed out, no matter what other markings or names may have appeared on them; yet the gate officer, P.W.8 allowed all ten of them to be carried out past him by the coolies who were engaged by the accused to remove his goods, and he tallied them out against the accused's dock warrants which the accused had personally given him shortly before the removals began..."

The gate officer released them because of what was said to him by a customs officer who was not called, but he released them as being ten of appellant's packages from the ship m.v. "Giang Ann" on the strength of the dock warrants.

We observe that in his judgment, the learned magistrate had disregarded what was said by anyone not called. PW15, a tally clerk of the Sibu agents of the shipping company, also tallied out these ten packages on the mate's receipts P9 and P10 as being ten of the packages appellant had imported. In his cautioned statement, appellant said:

"...I told the labourers to carry all the boxes bearing my name. So the labourers began to work while I engaged myself talking to the in-charge labourer, Chu Thian Mok, nearby."

In his defence appellant made an unsworn statement from the dock. Under section 202(5) of the Criminal Procedure Code, the court may draw such inference from such a preference as it thinks just. In his statement which is consistent with his cautioned statement, he said, *inter alia*:

"I asked Chu Thian Mok — coolie — to take delivery of the goods, and when these goods were released and taken away I was not present. I was also not present when the lorry came to transport the goods away. Therefore, I know nothing about the ten crates of cloth."

In effect, the defence was that the labourers had made a mistake. He had not explained how the mistake arose. Only he knew what precise instructions were given to his labourers. Such instructions must have been complete to enable the appellant to depart from the godown before the packages were loaded on to the lorry. It was not just a mere coincidence to quote the learned magistrate that what happened was — "...not that his coolies removed for him one wrong package but that they removed ten wrong packages and nothing else; that someone by mistake put his name or shipping marks on six of them; that someone by mistake shipped ten large packages...; that these by mistake were tallied on board against the marks 'S.T.B.'; that the customs men and the ship's agent at godown 'A' each made a mistake by allowing the accused's coolies to take away goods for him that did not belong to him; and that whoever was the importer of this valuable cargo had received no advice about its arrival in Sibu or never bothered about if after paying the exporter for it — or else that the exporter whether he was paid for the cargo or not, never bothered about informing the importer..."

The learned magistrate was right in holding that the appellant had failed to show on a balance of probabilities that his labourers had removed the wrong goods.

Having given the answers to the questions, we affirm the decision of the High Court and make an order that the appeal do stand dismissed.

Appeal dismissed.